2

No. 2754.

In the United States Circuit Court of Appeals for the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, ET AL.,

Defendants and Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR DEFENDANTS AND APPELLANTS, OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE.

Upon Appeal from the District Court of the United States, For the District of Oregon, from the Decree Entered December 9, 1915.

WM. F. HERRIN,
P. F. DUNNE,
WM. D. FENTON,
Solicitors and Attorneys for Said Defendants and Appellants.

FRANK C. CLEARY,
of Counsel.

Filed
APR 22 1916
F. D. Monckton,
Clerk

SUBJECT INDEX.

Assignment of Errors 7

Statement 1-6

The District Court Erred in Not Pursuing the Mandate of the Supreme Court 7-53

Costs Were Improperly Taxed Against the Appellants 53-58

TABLE OF CASES CITED.

Bissell v. Goshen, 72 Fed 545 32-32, 38

Burke v. S.P.RR.Co., 234 U.S. 679-80 36-37

Bybee v. Oregon & Cal. RR. Co., 139 U.S. 663, 674 37-38

Howe v. Lowell, 171 Mass. 582-3 49-51

Landers v. Landers, 151 Ky. 215-17 49-51

New Jersey Zinc & Iron Co. v. Morris Canal and Banking Co., 44 N.J.Eq. 403-4 43-44

Northern Trust Co. v. Snyder, 77 Fed. 818 56-57

Oregon & Cal. RR. Co. v. U. S., 238 U.S. 417-18 10

" " " " " 421-2 11,39

" " " " " 424-5 54-55

" " " " " 428 13,23

" " " " " 432-3 13-15, 39

" " " " " 434-4 15, 23, 38

" " " " " 436 8, 39

" " " " " 437 9

" " " " " 437-9 18

Reeves on Real Property, Section 423 41-42

Sanford Fork & Tool Co., Petitioner, 160 U.S. 247.....32-33, 38

Street on Federal Equity Practice, Vol. 2 Sec. 2022 57

United States v. Loughrey, 172 U.S. 210 42

United States v. Tennessee etc. RR. Co. 176 U.S. 253 43

No. 2754.

In the United States Circuit Court of Appeals for the Ninth Circuit

OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, STEPHEN T. GAGE, Individually and as Trustee, and UNION TRUST COMPANY, Individually and as Trustee,

Defendants and Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR DEFENDANTS AND APPELLANTS, OREGON AND CALIFORNIA RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, AND STEPHEN T. GAGE, INDIVIDUALLY AND AS TRUSTEE.

Upon Appeal from the District Court of the United States, For the District of Oregon, from the Decree Entered December 9, 1915.

STATEMENT.

The appeal here is from a decree of the District Court of Oregon, entered December 9, 1915. The decree was entered as a sequel and in assumed pursuance, of the mandate of the Supreme Court of the

United States, reversing a former decree of the District Court of Oregon, entered after trial on the merits. The short of it is, as appellants will contend, that the District Court of Oregon, in making the decree now appealed from, went beyond the mandate of the Supreme Court; decided and assumed to conclude matters in excess of the terms of the mandate; more specifically, undertook to impose an interpretation upon the rights of these appellants in respect to the timber on the land grant in question, not warranted, it is believed, by the terms of the mandate.

A land grant was made in 1862 to the Union Pacific and Central Pacific Railroads, in aid of the construction of a trans-continental railroad from the Missouri River to San Francisco Bay on the Pacific Ocean. The extension of that trans-continental railroad from some point in California, fixed at Roseville, near Sacramento, northward through California and Oregon to the City of Portland, was in the mind of Congress in 1866; and in that year a land grant was made in aid of the construction of such a railroad. So much of the land as lay within the State of Oregon, was granted to such company as should be designated by the Oregon Legislature, and upon that company was laid the burden of building the road from Portland south to the interstate line between Oregon and

California. The act of 1866 was amended in 1869, and in 1870 an additional act was passed granting land in aid of the construction of a railroad from Portland by way of Forest Grove to tidewater at Astoria on the Oregon Coast, and in a southerly direction to McMinnville, an Oregon point. The land embraced in the Act of 1866, as amended in 1869, and in the Act of 1870, is the Oregon land grant.

The act of 1866, as it was amended in 1869, provided,—and much the same provision, in terms, was in the act of 1870,—"that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding $2.50 per acre." But the Acts of 1866 and 1869 and of 1870 were relatively slow in arriving. The Pre-emption Law of September 4, 1841, the Oregon Donation Act of September 27, 1850, and the Homestead Law of May 20, 1862, had gone before.

The valley lands, adaptable for settlement and falling within the primary limits of the railroad grant, had been taken up under these earlier statutes. The railroad company was put to it to find its lands within the indemnity limits of the grant,—not valley lands these, but in great part mountain

forests. Some land there was, susceptible of cultivation, not a great deal of it, and this the railroad company, in the earlier years of the grant, disposed of for settlement, as contemplated by the settler's clause of the granting act. Later, and when the timber began to take on value, the company made sales of the timbered land—for lumber was soon to become, as it did, the principal industry of the state,—and those sales, naturally, were in larger quantities than the small parcels of the settlers' clause, and at somewhat higher prices, and not to farmers but to lumbermen. These transactions, in departure from the literal requirements of the settlers' clause, were open and above board. They were the only practicable way of making the grant responsive to what the Supreme Court has held to be the primary purpose of the act, namely, to aid in the construction of a railroad; they were matters of common knowledge; they were matters of public record; they were known to the people of the state, to the courts of the state and of the nation, to the Land Department and the executive government and to both houses of Congress. They were reported with the utmost particularity of transaction, in respect to the location and quantity of the lands sold and the prices paid, to a bureau of the Land Department specially constituted for the purpose of receiving and acting on such information, and this information, in all its particularity, was transmitted to the Secretary of

the Interior, and by him to the President, and by the President to both houses of Congress, and was there referred to the appropriate committees and perpetuated as executive documents; and this information was so communicated and transmitted every six months during a period of some eight or ten years, and in pursuance of an act of Congress precisely calling for the information. Everything that was done by the railroad company in dealing with these lands, was in the light of day, and went on for over a generation, indeed for nearly forty years, without objection from the State of Oregon, without objection from the Land Department or the Executive government or Congress. If a railroad company was ever justified, or the stockholder who put his money into it, or the bondholder who loaned his money to it, in believing that a course of conduct had been ratified by general acquiescence, and a departure from the literal and exact language of a statute had been waived, the case at bar is a revealing instance.

Indeed, Congress, at no time, of its own initiative called into question the course of dealing with these lands by the company. It was a memorial of the Legislature of Oregon, procured by interested parties to be adopted in the year 1907, and complaining of the temporary withdrawal by the railroad company of these granted lands from sale,—upon the

ground, as stated in the bill, "of the great injury inflicted upon commercial and industrial conditions,"—that moved Congress to take action. The Attorney-General was authorized by joint resolution, to proceed against the company, and the suit in equity, now pending, and of which this appeal is a phase, then followed.

It will be recalled that an appeal was taken by the company to this court from the decree of the District Court of Oregon, forfeiting the title of the company to the granted lands, as for a breach of the settlers' clause, construed in that court to be a condition subsequent. Upon a certificate of questions from this court to the Supreme Court, the whole record was ordered up and the case was considered and decided at large. The Supreme Court determined that the settlers' clause was not a condition subsequent, that it was a covenant only, enforceable by injunction. The decree of the District Court of Oregon was reversed, and the cause was remanded to that court for further proceedings in accordance with the opinion of the Supreme Court. It is the decree entered by the District Court in such further proceedings, that the pending appeal now brings in question, and for the reason, as it is submitted, that the decree is not in accordance with the opinion of the Supreme Court.

ASSIGNMENT OF ERRORS.

The assignment of errors on the part of the Oregon and California Railroad Company will be found at pages 28-38 of the transcript of the record in this cause; on the part of the Southern Pacific Company, at pages 39-49; on the part of Stephen T. Gage, individually and as trustee, at pages 49-59; and on the part of the Union Trust Company, individually and as trustee, at pages 60-70. The assignments of error for these four appellants are, it will be readily understood, substantially identical. It would serve no use or purpose to repeat these assignments at this point, in view of the argument which follows, and in which they are gathered up. It will be necessary, we venture to think, to say that they all turn, with more or less particularity and variation of form and expression, on the fundamental contention that the District Court erred in not pursuing the mandate of the Supreme Court of the United States. The lower court, it may be added, adjudged costs against these appellants, and to its action in that regard error is assigned.

THE DISTRICT COURT ERRED IN NOT PURSUING THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES.

The contention of the government that the settlers' clause was a condition subsequent, entailing a forfeiture for its breach, was rejected by the

Supreme Court. The cross-complainants, alleging themselves to be "actual" settlers upon the land, and the interveners, alleging themselves to be "constructive" settlers upon the land, made the contention that they had rights in the land as beneficiaries of a trust which the railroad company, as trustee, should be constrained to execute,—that contention was rejected. The settlers' provisos were held to be covenants, enforceable by an injunction against future violations of the same. We give the words of the opinion, 238 U. S., at page 436: "Rejecting, then, the contention of the government, and the contentions of the cross-complainants and interveners, and regarding the settlers' clauses as enforceable covenants, what shall be the judgment? A reversal of the decree of the District Court, of course; and clearly an *injunction* against *further* violations of the covenants."

That the injunction contemplated was in the nature of a restriction upon the *future* conduct of the railroad company, is again brought out at the same page of the opinion. The court is referring to the disregard of the covenants, to the gains received by the company in excess of the legal or statutory price as fixed by the settlers' clause, and it goes on to say: "In view of such disregard of the covenants and gain of illegal emolument, and in view of the government's interest in the exact ob-

servance of them, it might seem that *restriction* upon the *future* conduct of the railroad company and its various agencies is imperfect relief; but the government has not asked for more."

And again, at page 437 of the opinion, the court says: "However, an injunction simply against *future* violations of the covenants, or to put it another way, simply mandatory *of their requirements,* will not afford the measure of relief to which the facts of the case entitle the government."

It is not to be assumed, however, for a moment, that the court, in holding the provisos to be covenants enforceable by injunction and that an injunction should go against future violations of them, decided, or meant to decide, that these covenants were directive to the grantee or imposed any obligation upon it to make sales of the lands or were other than restrictive in character—restrictive, in the sense that if the railroad company exercised its option to make sales of the granted land it was restricted in such sales, so far as purchasers were concerned, to actual settlers; so far as quantities were concerned, to a maximum of 160 acres to each purchaser; and so far as price was concerned, to a maximum of $2.50 an acre. An injunction, enforcing the covenants to the extent and by the measure of these restrictions, was the injunction which the court had in mind.

To illustrate: The court, at pages 417-418 of the opinion, is meeting the argument of the government that the railroad company has made a breach of the provisos and was amenable to a forfeiture. "In its argument at bar," says the court, "the government insisted that it was the duty of the railroad company to have provided the machinery for settlement, and, by *optional* sales, guarded by probational occupation of the lands, to demonstrate not only initial, but the continued, good faith of settlers; and that the omission to do so was of itself a breach of the provisos, and incurred a forfeiture of the grants. But when" the court continues, "did such obligation attach? Before or after the construction of the road—construction in sections, or completely? The contention encounters *the government's admission that there was no obligation imposed upon the railroad to sell.* And we have the curious situation —which is made something of by cross-complainants and interveners in opposition to the government's contention,—of the right of settlers to buy, *but no obligation on the railroad to sell,* and yet a duty of providing for sales under an extreme and drastic penalty. We may repeat the question, Might not such consequences have ended the enterprise, making it and its great purpose subordinate to local settlement? Indeed, might not both have been defeated by the inversion of their purposes."

The court rejects, as well, an argument made for the grantee that the covenants, expressed by the provisos, were not enforceable because of their lack of certainty, repugnancy to the grant, and impossibility of performance. The court saw, in the sales made in earlier years to settlers of some hundred and sixty-three thousand acres of the granted land, a demonstration of the certainty and practicability of the provisos; and it went on to show that, while these provisos imposed no affirmative duty upon the railroad company to make sales, yet when sales were in point of fact made, it was the duty of the railroad company to make those sales within the limitations and prohibitions of the covenant. After referring to the example of these early sales to settlers, the court says, at pages 421-2 of the opinion, "The demonstration of the example would seem to need no addition. But passing the example, as it may be contended to have some explanation in the character of the lands so disposed of, the deduction from the asserted uncertainties is met and overcome by the provisos and their explicit direction. They are, it is true, cast *in language of limitation and prohibition;* the sales are to be made *only* to certain persons and *not exceeding* a specified maximum in quantities and prices. If the language may be said *not to impose* 'an *affirmative* obligation to people the country' it certainly imposes an obligation not to violate the limitations and prohibitions *when*

sales were made; and it is the concession of one of the briefs that the obligation is unenforceable, and that, even regarding the covenant as restrictive, the 'jurisdiction of a court of equity upon a breach or threatened breach of the covenant, to enforce performance by enjoining a violation of the covenant cannot be doubted.' Apposite cases are cited to sustain the admission, and in answer to the *contention of the government that it could recover no damages for the breach* and hence had no enforceable remedy but forfeiture, it is said: 'But the jurisdiction of a court of equity in such cases does not depend upon the showing of damage. Indeed, the very fact that injury is of public character and such that no damage could be calculated is an added reason for the intervention of equity.' And cases are adduced."

The opinion now proceeds: "We concur in the reasoning, and give it greater breadth in the case at bar than counsel do. They would confine it, or seem to do so, to the *compulsion of sales* of land susceptible of actual settlement, and assert that the evidence established that not all of the lands, nor indeed the greater part of them, have such susceptibility. But neither the provisos nor the other parts of the granting acts make a distinction between the lands, and we are unable to do so. The language of the grants and of the limitations upon them is general. We cannot attach exceptions to it. The evil of an

attempt is manifest. The grants must be taken *as they were given.* Assent to them was required and made, and we cannot import *a different measure* of the requirement and the assent *than the language of the act expresses.* It is to be remembered that the acts are laws as well as grants and must be given the exactness of laws."

Again, at page 428, the court says: "The character of the lands furnished no excuse. *It might have justified non-action,* but it did not justify antagonistic action."

Again, at page 432, the court can see no merit in the claim of the interveners, who were mere constructive or potential settlers, under a statute dealing with actual settlers. "The word 'actual'," the court says "expresses a settlement completed, not simply contemplated or possible. Upon the express words of the provisos, it would seem that interveners' claims to be beneficiaries of the trust, if there is a trust, must be refuted." But as to the cross-complainants, alleging themselves to be actual settlers, the argument, under a statute dealing with actual settlers *eo nomine,* is more difficult and the considerations are more appealing and this leads the court to re-affirm its interpretation that these provisos are restrictive merely, not directive.

Said the court (p. 432): "The cross-complainants present arguments of more difficulty, supported by appealing considerations. 'Actual settlers' are the words of the provisos, and we may assume actual settlers were contemplated, and sales of the lands were *restricted* to them; but how were actual settlers to be ascertained and by whom? And was there a *compulsion or option* as to sales? There could not be an absolute right to settle or purchase *unless there was an absolute compulsion to sell.* The acts of Congress omit regulation. *Their language is not directive; it is restrictive only.* With this exception, the grant is unqualified." But the court says further (pp. 432-3): "There is plausibility in the argument which represents that if the provisos be held to give to the railroad *a discretion of sale, the choice of time and settlers,* their requirement is impotent, and instead of securing settlement would prevent it; instead of devoting the lands to development, retain them in monopoly and a kind of mortmain."

"We feel the strength of the argument but cannot yield to it. There are countervailing ones. We have already indicated that *nothing can be deduced from the imperfections of the granting acts.* Indeed, the argument of cross-complainants, like a great many other contentions in the case get their plausibility from the abuses of the granting acts, not their uses. We have seen that in the early days of the grants,

settlements were normally made and the railroad, *in the exercise of its discretion,* responded to such settlement by sales to settlers."

Again, pointing to the withdrawal of the granted lands from the operation of the public land laws and to the resulting differentiations, the court says (p. 434): "The public land laws had tests of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose, they were committed to another power, to be administered for such purpose, *and a discretion in the exercise of the power*, within the restriction imposed, was necessarily conferred."

And finally, at pages 434-5 of the opinion, the court says: "There was a complete and absolute grant to the railroad company with power to sell, *limited only as prescribed,* and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres.' And we add, it might choose the time for selling, or its use of the grants as a means of credit, subject ultimately to the restrictions imposed; and we say 'restrictions imposed,' to reject the contention of the railroad company that an implication of the power

to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

It is abundantly clear from the decision of the Supreme Court, that the language of these provisos "is not directive, it is restrictive only;" and that the obligation imposed upon the company is "an obligation not to violate the limitations and prohibitions when sales were made." The absolute grant to the railroad company carried the "power to sell, *limited only as prescribed.*" The company, as the government itself argued, and as the court agreed, "might choose the actual settler, might sell for any price not exceeding $2.50 an acre, might sell in quantities of 40, 60 or 100 acres, or any amount not exceeding 160 acres;" and more than that, as the court explicitly held, "it might choose the time for selling."

There can be no misunderstanding of the position of the court, as to whether there was "a compulsion or option as to the sales."

An injunction, therefore, "against *future* violations of the covenants," as decreed by the court, once the covenants, as construed by the court, are understood, is not difficult to appreciate. It does not import or imply a direction to the company to make

sales, for the covenants were not directive. It does import a restriction upon the company, for the covenants were restrictive—subject to a restriction, "when sales were made," made not under "compulsion" but at the "option" and in the "discretion" of the railroad company, that such sales should not violate the limitations and prohibitions of the provisos—that they should not be made except to actual settlers, that they should not be made in quantities to exceed 160 acres, and that they should not be made at prices in excess of $2.50 an acre. A decree for such an injunction, would be a decree in accordance with the opinion of the court.

One thing, however, was quite clear to the court—that the settlers' clause was a settlement clause, that it was not passed for the benefit of timber speculators; and that the government was entitled to some measure of relief, conservative of the policy of the act. The restriction on the railroad company, in making sales of forest land insusceptible of settlement, but highly valuable for timber, to a maximum price of $2.50 an acre, would be virtually an invitation to the timber speculator, under the guise of a settler; the railroad company would be limited to that constituency for its purchasers; and the Congressional policy and intent would be defeated. Some measure of relief the government was entitled to, appropriate to that situation, and the court

seemed to think that the easiest way out of the difficulty was to refer the matter to Congress for some amendatory legislation.

The court makes no suggestion as to the character of this amendatory legislation, except that it is careful to say that any action by Congress in the premises must "secure to the defendants *all the value* the granting acts conferred upon the railroads." It will be convenient and aidful to quote the language of the opinion touching this measure of relief to which the government is entitled, over and above the injunction against future violations of the covenants. At pages 437-9 of the opinion, the court says:

> "The Government alleged in its bill that more than 1000 persons had made application to purchase from the railroad company in conformity to the covenants. In answering the defendants averred that such applications were made by persons who desired to obtain title *on account of the timber* and not otherwise, and *for the purpose of speculation only* and not in good faith as actual settlers. And it was averred that the lands were chiefly and in most instances solely of value because of the timber thereon and were not fit for actual settlement. And, further, that the lands capable of actual settlement and the establishment of homes thereon at no time 'exceeded (approximately) 300,000 acres, consisting of small and widely separated tracts, all of

which were sold to actual settlers or persons claiming to be such during construction and prior to completion, respectively, of said railroads, in quantities of 160 acres or less to a single purchaser, at prices not exceeding $2.50 per acre.'

"A great deal of testimony was introduced, consisting not only of that of witnesses but of maps, photographs, reports and publications, which tended to establish the asserted character of the lands. And there was evidence in rebuttal. We cannot pause to determine the relative probative force of the opposing testimonies. It is, however, clear, *even from the Government's summary of the evidence,* that lands which may be fit for cultivation have a greater value on account of the timber which is upon them. Besides, *for our present purpose* we may accept the assertion of defendants; and we have seen that Congress extended the *Timber and Stone Act to the reserved lands,* and, by the act of August 20, 1912, *supra,* it has *withdrawn from entry* or *the initiation of any right whatever* under *any of the public land laws* of the United States the lands which might revert to the United States by reason of this suit.

"This, then, being the situation resulting from conditions now existing, incident, it may be, to the prolonged disregard of the covenants by the railroad company, *the lands invite now more to speculation than to settlement,* and we think, therefore, that the railroad company should not only be enjoined from sales in violation of the

covenants, but enjoined from *any disposition* of them whatever *or* of the timber thereon and from cutting or authorizing the cutting or removal of any of the timber thereon, *until* Congress shall have a reasonable opportunity to provide by legislation for their disposition in accordance with such policy as it may deem fitting under the circumstances *and at the same time secure to the defendants all the value the granting acts conferred upon the railroads.*

If Congress does not make such provision the defendants may apply to the District Court within a reasonable time, not less than six months, from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act, and the court in its discretion may modify the decree accordingly.

Decree reversed and cause remanded to the District Court for further proceedings in accordance with this opinion."

It will be seen, therefore, that the opinion of the Court contemplates as well a secondary and temporary injunction as a general and permanent injunction. The general and permanent injunction is against future violations of the covenants as we now know those covenants to be, in their scope and effect, as understood by the court. The secondary and temporary injunction it is, and that only, which has reference to the timber. Its obvious purpose is

to maintain the *status quo,* so far as these lands and the timber upon them are concerned, for a limited period, until some adjustment, remediable of the anomaly that valuable timber lands should be salable at $2.50 an acre, can be accomplished. Whatever adjustment may be made, it must be consistent with the vested rights of the railroad company. No legislation by Congress providing for the disposition of these lands by their owner, the railroad company, is within the mind of the court, except such as is consistent with the vested rights of the railroad company—such as shall "secure to the defendants all the value the granting acts conferred upon the railroads." It is not contemplated, it could not have been, that Congress should provide for a disposition of those lands by Congress itself, or by anybody else who did not own the lands. The effort of the government in this litigation to disestablish the ownership of the railroad company, to enforce a forfeiture, to revest the title in the United States has failed. That contention had been definitely rejected. The railroad ownership had been vindicated and confirmed over and over again, but the owner of those lands, the railroad company, in essaying to make any disposition of these lands, was hedged in by the terms of a restrictive covenant, enforceable by injunction—was limited, in the disposition of these lands, to sales to actual settlers, in small parcels at a price of $2.50 an acre. The condition of the

subject matter of the covenant—its physical and its economic condition—was inconsistent with such a covenant, the land was timber land, it was not settlement land, it was insusceptible of settlement, and its value was over and away in excess of $2.50 an acre. Some relief from this impracticable covenant —some feasible and equitable relaxation of its strictness in the way of an amendment and expansion of the power of disposition conferred upon the railroad company—this was the real problem as the court saw it, and this is made apparent if we turn again to the opinion itself.

If these covenants were unworkable, the course of the railroad company, as the court saw it, was not to ignore or disregard them—they were a contract and a law. The true course was to go to Congress for some amendatory legislation in the way of relief from their requirements. The judgment of the court on the grant and on these covenants, it was said, was not to be determined by suggestions *ab inconvenienti;* "It is determined," we give the language of the opinion "by the simple words of the acts of Congress, not only regarded as grants but as laws, and accepted as both; granting rights but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; and, as we have pointed out, *whatever the difficulties of perform-*

ance, relief could have been applied for, and, it might be, have been secured through an appeal to Congress. Certainly, evasion of the laws or the defiance of them should not be resorted to." And taking these covenants as it found them, the court was not willing to enlarge their obligation by the wisdom that comes after the event. "Nor can their obligation," said the court, "be magnified by looking backwards, by the results achieved rather than when they were only hoped for—by conditions of which there was not even prophecy." (Opinion p. 435).

Again, the court has said, at page 428: "The character of the lands furnished no excuse; it might have justified non-action, but it did not justify antagonistic action." And more at large, and instructively, the court says, (pp. 422-3): "If the provisos were ignorantly adopted as they are asserted to have been; if the actual conditions were unknown as is asserted; if but little of the land was arable, most of it covered with timber and valuable only for timber and not fit for the acquisition of homes; if a great deal of it was nothing but a wilderness of mountain and rock and forest; if its character was given evidence by the application of the Timber & Stone Act to the reserved lands; if settlers neither crowded before nor crowded after the railroad, nor could do so; if the grants were not as valuable for

sale or credit as they were supposed to have been, and difficulties beset both uses, *the remedy was obvious.* Granting the obstacles and infirmities, *they were but promptings and reasons for an appeal to Congress to relax the law;* they were neither cause nor justification for violating it." A decree, then, in accordance with the opinion of the Supreme Court would be injunctive in character, and of a two-fold aspect. It would, in the first place, enjoin the railroad company, generally and permanently, from future violations of these restrictive covenants. It would, in the second place, and as a suspensive measure, hold the lands *in statu quo* for a limited period until some relief from the strictness of disposition required by covenants, when seen to be inapposite to the subject matter, can be afforded by Congress. This secondary and suspensive injunction puts the sales of the land, although made in full conformity with the provisos, and as well the use of the timber by the company, in precisely the same category. Notwithstanding that the railroad company might seek to dispose of 160 acres of this land, during the period of the suspensive injunction, to an actual settler, at $2.50 an acre—pursuing literally the terms of the proviso—it is enjoined *ad interim* from doing so; and it is likewise enjoined, during the interim from using the timber. The company's clear right to sell these lands, if it so elects, in conformity with the provisos, was a thing

conceded of everybody—it goes without saying. But that clear right is put in abeyance by the temporary injunction; and similarly, the equally clear right of the owner of the land to the timber growing upon it, is put in abeyance for the same period and in the same way. No question has been made in this case, whether in printed briefs or in oral discussion at bar, as to the right of an owner by absolute grant to the use of the timber on his land. No such question was decided in the opinion of the court; no such question was stated or considered or discussed in that opinion. What the lower court was directed to do, was to enter an injunctive decree, restraining the railroad company from future violations of the covenants, as those covenants had been construed by the Supreme Court, and, further, by secondary and temporary injunction, to preserve the *status quo* in respect to the lands and the timber until Congress could interpose with some relief by amendatory legislation, consistent with the vested rights of the owner of the grant.

The District Court, it is to be said with great deference, was not content to pursue the mandate of the Supreme Court. Its decree was in excess of that mandate. It was what this court has termed an "intermeddling" with matters outside the scope of the mandate. It proceeded to determine that the railroad company had no right to use the timber

upon its own lands while they were still unsold and in its possession and occupancy; it determined that the railroad company could not even make a clearing in anticipation of a sale to some settler; and it adjudged that the owner of the land could make no disposition of the timber except to sell it, when it sold the land to a settler at $2.50 an acre. Two decrees were presented to the District Court—the one, by the government, imposing these new and added features upon the mandate of the Supreme Court, and this proposed decree, with an omission not material here, was adopted by the District Court; the other, by these appellants, pursuing the very terms of the mandate. These decrees are set forth in the transcript of the record. The decree as signed by the District Judge will be found at pages 93-6 of the transcript. The decree as proposed by these appellants will be found at pages 91-3 of the transcript.

We should now look at these decrees. The first paragraph is the same in both decrees. It provides that the original decree of the District Court, being the decree of forfeiture, "so far as it affects the defendants," naming the appellants, "be, and the same is hereby set aside and held for naught, but is adhered to in all respects as to the defendants and cross-complainants, hereinafter called the 'cross-complainants,' and the 'interveners'." The second paragraph of the decree proposed by these appel-

lants, expresses the general injunction, ordered by the Supreme Court, against future violations by the railroad company of the covenants. It is in these words: (Tr. p. 92), "that the said defendants and their respective officers and agents be, and each is hereby enjoined, *from selling the lands,* or any part thereof, granted either by the act of Congress approved July 25, 1866, as amended by the act of Congress of April 10, 1869, or by the act of Congress approved May 4, 1870, whether the said lands be situated within the place or indemnity limits of the grants thereby made, *to any person not an actual settler, or in quantities greater than one-quarter section to one purchaser, or for a price exceeding two and 50/100 dollars ($2.50) per acre.*"

The second paragraph of the decree, as signed by the District Judge, so far forth as its first clause, is —barring the fact that the words "on the land sold to him" have been inserted therein after the words "actual settler"—the same, word for word, as the paragraph of our proposed decree which has just been quoted. But the government added, and the District Court adopted, a second and further clause, touching the timber on the granted lands—likewise any mineral found thereon—and, as part, not of any temporary injunction, but of the general and permanent injunction, enjoining the owner of the land from any disposition of the timber, or for the matter

of that, of any mineral deposits therein, except as that timber or those deposits went along with the land when it was sold within the limitations of the covenants, as indicated in the first clause. We quote this second, interpolated clause: (Tr. p. 94), "and from selling any of the timber on said lands, or any mineral or other deposits therein, except as a part of and in conjunction with the lands on which the timber stands or in which the mineral or other deposits are found, and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits." This decree, it will be seen, imports bodily into the general injunction, a provision more or less reflective of the temporary restraint which the mandate imposes in aid of the maintenance of the *status quo* pending Congressional interposition. It is a gratuitous enlargement and exceeding of the terms of the mandate.

Paragraph 3 of our proposed decree, (Tr. pp. 92-3), pursues in terms the mandate of the Supreme Court, touching the temporary injunction. We quote paragraph 3:

> "That the said defendants and their respective officers and agents be, and each is hereby,

enjoined from any disposition of the said lands, or any part thereof, or of the timber thereon, and from cutting, or authorizing the cutting, or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for the disposition of said lands, in accordance with such policy as it may deem fitting under the circumstances, and at the same time secure to the defendants all the value the granting acts conferred upon the grantees; but if Congress does not make such provision, the defendants may apply to this court, within a reasonable time, not less than six (6) months from the entry of the decree herein, for a modification of so much of the injunction herein ordered as enjoins any disposition of the lands and timber until Congress shall act."

This paragraph of our proposed decree will bear comparison, word for word, with the language of the opinion of the Supreme Court.

Paragraph 3 of the decree as signed by the District Court (Tr. pp. 94-5), like our paragraph 3, is meant to express the temporary injunction. We understand it to mean the same thing as our proposed paragraph 3, and we note these differences: that the decree as signed takes in, as well mineral or other deposits in the lands, as the timber thereon—although the opinion of the court will be searched in vain for anything concerning minerals; and in-

cludes, also, moneys which have arisen, or may hereafter arise from sales of the lands or of the timber, or through condemnation proceedings or otherwise, and when impounded, or which may hereafter be impounded, *in custodia legis* to await the final decision of the Supreme Court. No reference to such moneys was made in our proposed decree for the reason that such impounded moneys were covered by appropriate orders in the particular litigation.

Paragraph 4 of the decree as signed is a mere continuation of the subject matter of paragraph 3, and deals with the right of defendants to apply for a modification of the injunction in the event that Congress should fail to act. (Tr. p. 95).

Paragraph 5 of the decree as signed includes, as part of the lands covered by the decree, such lands as have reverted or may hereafter revert to the defendants—looking more to such lands as may be embraced by executory contracts of sale on which the purchaser has suffered or may suffer default. (Tr. p. 96).

And paragraph 6 makes the decree to be without prejudice to any rights of the government under the joint resolution of Congress, of April 30, 1908, being the resolution authorizing the Attorney-General to proceed against the granted lands; or under the Act of Congress of August 20, 1912, being the

statute authorizing the compromise of suits against purchasers from the railroad company. This need not detain us.

The seventh paragraph of the decree as signed awards costs against the appellants and in favor of the complainant to the amount of $6,249.02; and we shall consider these costs later.

So far, then, as the timber is concerned, the difference between the two decrees—between the one as proposed by us and the one signed—will be found in the new and added features in excess of the language of the mandate, imported by the decree into the second clause of the second paragraph—by which the defendants are enjoined not only from selling the lands, not only from future violations of the covenants, but also—and for convenience we quote again:

> "from selling any of the timber on said lands, or any mineral or other deposits therein except as a part of and in conjunction with the land on which the timber stands or in which the mineral or other deposits are found; and from cutting or removing or authorizing the cutting or removal of any of the timber thereon, or from removing or authorizing the removal of mineral or other deposits therein, except in connection with the sale of the land bearing the timber or containing the mineral or other deposits."

Mr. Justice Lurton of the Supreme Court of the United States, was a member of the Circuit Court of Appeals which decided the case of *Bissell v. Goshen,* 72 Fed. 545. Judge Lurton, himself, wrote the opinion in that case, and the court, speaking through him, said (at p. 548):

> "Whatever was before it (speaking of the Appellate Court) by virtue of that appeal, and was disposed of, has been finally done, and must be regarded as settled. The Circuit Court is bound by such decree *as the law of the case,* and must carry it into execution *according to the mandate.* The decree of this court upon any matter within its jurisdiction *can neither be modified, reversed, enlarged, nor suspended* by the Circuit Court nor can any other or less or greater relief be accorded *than that prescribed by its decree and mandate.*

Judge Lurton goes on to quote "the very pertinent summary of the doctrine by Justice Gray" in the case of *Sanford Fork & Tool Company, Petitioner,* 160 U. S. p. 247, as follows:

> "When a case has once been decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree *as the law of the case,* and must carry it into execution, *according* to the mandate. That court cannot vary it, or examine it for any other

purpose *than execution,* or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. U. S.,* 12 Pet. 488, 492; *Railway Co. v. Anderson,* 149 U. S. 237, 13 Sup. Ct. 843. If the Circuit Court mistakes or construes the decrees of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount), or by writ of mandamus to execute the mandate of this court."

And further, at page 552, Judge Lurton says:

"It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that *it is the clear duty* of the lower court to give effect to the decree *without modification or enlargement, in the very terms of the decree here rendered.*"

No question of the right of the grantee of these lands, by an absolute grant qualified only by the provisos, to use the timber upon its unalienated land, or to take the coal from it or the iron that might be found below the surface, was, as we have already ventured to insist, involved or raised or argued or considered or presented. That issue was not before the court, and it is not determinable as an

academic thesis or otherwise than in some concrete case properly calling for its determination. Nevertheless, gratuitously, and in excess of the mandate of the Supreme Court, the decree, as proposed by the government and adopted by the District Court, assumes or attempts to foreclose these appellants in the premises. If there is anything in the opinion of the Supreme Court remotely hinting at a solution, it is to be found in the assignment by that court, in providing a temporary injunction, of our right to the timber and our unquestioned right to make sales of these lands to settlers in statutory quantities and at statutory prices to precisely the same category. Both rights are associated in immediate juxtaposition, and both rights are suspended pending the interval of contemplated Congressional policy, and both rights are assumed to be open to revival in the event of inaction by Congress.

It is true that the Supreme Court refused to forfeit this grant. It is true that the Supreme Court retained the title to these lands where the grant had put it—in the railroad company—but the thought seems to be that the failure of the government to achieve a forfeiture may be repaired by the action of Congress, and that, in some mysterious way, an appellate jurisdiction may be exercised by the legislature to review the judgment of the Supreme Court and to declare a forfeiture where the court had decided there could be no forfeiture. In

other words, it is the idea, as put forth by complainant in the argument at the bar of the District Court, and sought to be realized in the decree as signed, that Congress, by legislation, may revest itself with the title which it had granted to the railroad company and that, after all, the railroad company has a mere equity in a fund measured by $2.50 an acre in the total acreage concerned, subject, again, to deduction by reason of any excess over $2.50 an acre, which the railroad company may have received for some of these lands, and quite regardless of the administration expenses incurred by the railroad company in handling the grant, and regardless as well of the uncompensated services rendered and to be rendered by the railroad company through all the years in transporting government troops and materials, and regardless also of the fact that the railroad company kept its bargain with the government, and, by the construction of this road, earned the grant and received its patents accordingly. We are no longer, it would seem, the owners of this land by absolute grant, or at all; but by a novel species of equitable conversion the land is now revested, or by amendatory legislation is to be revested, in Congress, and we are to be transformed into beneficiaries of a sadly depleted fund.

We venture to think, however, that we are the owners of this land, by right, and as of absolute grant, qualified only by these provisos and by noth-

ing else, and that, as such owners, we are entitled to the timber upon our unalienated land, and entitled as well to take the coal or the iron, for example, that we may find below the surface.

The language of the Supreme Court of the United States in the recent case of *Burke vs. Southern Pacific R. R. Co.,* 234 U. S., at pages 679-680, is wholesome reading at this point:

> "We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the government and the public, and to that end, provision was made for compensating the company if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the pro-

posal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. *Menotti v. Dillon,* 167 U. S. 703, 721. And when, by constructing the road and putting it into operation, the company performed its part of the contract, it became entitled to the performance by the government. In other words, it earned the right to the lands described. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the government, but the grant should not be treated as a mere gift."

This very act of 1866 was before the Supreme Court in *Bybee against Oregon & California Railroad Company,* 139 U. S. 663, 674. The court had no difficulty at that time in perceiving that this grant was like any other railroad land grant; that it was a grant of real estate, not an assignment of personalty by way of an equity in some fund, and that it was a grant *in praesenti.* The court said:

"The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered by this court as taking effect *in praesenti,* although the particular lands to which the grant is applicable remain to be selected and identified when the road is located,

> and the map is filed with the Secretary of the Interior. *The act then operates as a grant* of all odd numbered sections within the limits, except so far as they may have been in the meantime, 'granted, sold, reserved, occupied by homestead, settlers, pre-empted or otherwise disposed of.''

And what the Supreme Court did decide in the case at bar, and its decision is now "the law of the case *(Bissell v. Goshen,* 72 Fed. 545; *Sanford Fork & Tool Company, Petitioner,* 160 U. S. 247) was this:

At pages 434-5 of the opinion in the case at bar, it said:

> "*There was a complete and absolute grant to the railroad company* with power to sell, *limited only as prescribed,* and we agree with the Government that the company 'might choose the actual settler; might sell for any price not exceeding $2.50 an acre; might sell in quantities of 40, 60, or 100 acres, or any amount not exceeding 160 acres.' *And we add,* it might choose the time for selling or its use of the *grants as a means of credit,* subject ultimately to the restrictions imposed; and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure divested of the obligations of the provisos."

And again, at page 422: "The language of the grants and of the limitations upon them is general. *We cannot attach exceptions to it.* The evil of an attempt is manifest. The grants must be taken *as they were given.* Assent to them was required and made, and we cannot import a *different measure* of the requirement and the assent *than the language of the act expresses.* It is to be remembered, the acts are laws as well as grants, and must be given the exactness of laws."

Again, at page 436: "We can only enforce the provisos *as written,* not relieve from them."

At page 432, recalling now the language just quoted, that "there was a complete and absolute grant to the railroad company, with power to sell, *limited only as prescribed,*"—we quote from what the court says of these prescribed limitations or provisos: "Their language is not directive; it is restrictive only. *With this exception the grant is unqualified.*"

The provisos, therefore, and such is now the law of this case, must be taken as they are written; they are not directive, they are restrictive only; the statute must be administered with the exactness of a law; the grant in unqualified, except as limited by the terms of the provisos. The limitations there found extend only to the disposition by sale of the

land by the grantee; they do not affect the use and occupancy of the unalienated property, held in complete, absolute and unqualified grant. It cannot be questioned, we venture to think, that the grantee, would be within its rights in making leases of the land, and applying the rents upon the construction. Nor, we submit, can it be questioned that the grantee would be authorized to take stone from the land and use it to build a railroad bridge or a station house, or for the matter of that, to turn the stone into money and place the avails against construction debt. Nor do we think it could be questioned that the grantee could take iron from the granted land for use upon its railroad fixtures or structures, or could take coal from the land—if such minerals were found there—to burn in the furnaces of its locomotives or of its machine shops. If the grantee should farm a patch of arable area, and turn the farm products into money and use that money to help pay coupon interest on the bonded debt, it would be within its rights and within the measure of its estate—for that estate is "a complete and absolute grant to the railroad company with power to sell, limited only as prescribed." If all this be true, there is no reason apparent to us upon the face and terms of the statute why the right of the grantee in a like way to make use of the timber upon the land, should be differentiated or disparaged.

It would be passing strange if the government should now maintain that the company has no right to the timber upon these lands because and although, for many years before coal was used as fuel, it used this timber without question; and the right to use that timber, whether to burn it as fuel, or to use it in the upkeep and maintenance of the railroad, is in the forefront of the act of Congress itself, for that act granted the lands "to secure safe and speedy transportation of mails, troops, munitions of war and public stores over the line of said railroad." There could be no such transportation begun or kept up without a railroad, a railroad constructed not only but also maintained, and without fuel for motive power. Would the use of that timber to help pay the construction debt be in contravention of the railroad policy of the act? Would the removal of that timber go in defeat of the settlement policy of the act? Would it not be primarily and directly in aid of such policy?—For it is obvious enough that without a clearing most of the land is unfit for settlement.

Ferens ligna in silva—but we beg to quote the apt language from Reeves on Real Property, Section 423, where, in speaking of the grantee of the fee simple estate, the author says:

> "*Subject to any restrictions* under which he may have taken it, and subject also to the mandate of the maxim *sic utere tuo ut alienum non*

> *laedas,* its owner when in possesion may use it for any purpose and in any manner that he may choose; he may cut timber, open and work mines, cultivate the soil even to exhaustion, build or pull down houses, commit waste, or injure or destroy any part of it as he may please. Not only does he have the right to sell or otherwise dispose of it as a whole, but he may grant or convey out of it any inferior interests, such as estates for years, for life or in tail."

Even if the estate here had been upon a condition subsequent—if the contention had prevailed that the proviso was a condition subsequent,—it would still remain, as said by this court in *United States vs. Loughrey,* 172 U. S., p. 210:

> "When the property is held on condition, all the attributes and incidents of absolute property belong to it until the condition is broken."

In the Loughrey case, speaking of the timber, this court said:

> "Counsel are mistaken in supposing that the plaintiffs had an immediate right to the possession of this timber. They had no right to the possession of the land until Congress passed the act of March 2, 1889, forfeiting the grant. Up to that time the title was in the State, and until then the United States had no more right to enter and take possession than they would have had to take possession of the property of a private individual."

And in *United States v. Tennessee etc. Railroad,* 176 U. S. 253, opinion by Mr. Justice McKenna, this court said:

> "The title passed to the State, it was decided, continued in the State with all its attributes and power, except as expressly limited, until it should be resumed by the grantor by appropriate proceedings for breach of conditions. Hence the *logs* in that case, *though cut upon land* to aid a railroad which had not been constructed, and after the time designated for its construction, and after which all unsold lands should revert to the State, *was held to belong to the State.* And in the Courtwright case upon the same principles it was held that lands sold by the railroad without constructing the road carried title to the vendee. There was a reassertion and an application of the same principles in *United States vs. Loughrey,* 172 U. S. 206.
>
> "It follows that by the act of June 3, 1856, the State of Alabama took the title to the lands in controversy upon conditions subsequent, and conveyed such title upon the same conditions to the Coosa Railroad; and that it continued in the railroad until determined by proceedings, legislative or judicial, for such forfeiture, and until such determination, all the rights and powers conferred by the act continued and could be exercised."

In the New Jersey case of *New Jersey Zinc and Iron Co. v. Morris Canal and Banking Co.,* 44 N.J. Eq., pp. 403-4, this apt language is used:

"The difference in the legal effect which must be attributed to the conveyance of an estate in fee, whether absolute or qualified, and the right which the defendants acquired by simply taking possession of land for a right of way, or condemning it for a like purpose, is wide and vital. Under a conveyance, even if it be of only a qualified fee, the defendants have, while their estate continues, by the plain terms of their grant, an absolute right to the exclusive possession of the land conveyed, and any attempt by their grantor to exercise any sort of possession over the land, or to use any part of it as a means of profit or advantage to himself, would be in plain derogation of his grant, and a clear violation of the defendants' rights. The defendants, under a deed conveying only a qualified fee, would, while their title continued, have the same right to the exclusive use and enjoyment of the land, and as complete dominion over it, for all purposes, as though they held it in fee simple absolute, and no one, I suppose, would pretend that it would be possible for a grantor, after making a title of that description, to set up, with the least show of success, a right or interest of any kind in the land conveyed."

Upon this question of timber and the rights of the owner of a fee therein or, more largely speaking, upon the question of waste, to use the old common law term—the case of *Landers v. Landers,* 151 Ky., at pages 215-217, gives an instructive summary of

the law, and with special reference, in that case, to a defeasible fee. We think it may be convenient at this place to make the quotation:

> "The next question to be determined is whether or not plaintiffs may recover damages from the estate of Bryant Landers for the timber cut and removed by him from the 170 acres of land devised to him by John Landers, and in which he owned only a defeasible fee. Our statute on the subject does not cover a defeasible fee, so recourse must be had to the common law. In 2 Blackstone, page 282, we find the following:
>
> 'Let us next see who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories: *"si vassalus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur."* But in our ancient common law the rule was by no means large; for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons: guardian in chivalry, tenant in dower, and tenant by the curtesy; and not in tenant for life or years; and the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by

his lessee; and, if he did not, it was his own default. But, in favor of the owners or the inheritance, the statutes of Marlbridge, 52 Hen. III, c. 23, and of Gloucester, 6 Edw. I, c. 5, provided that the writ of waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. So that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment for waste, *absque impetitione vasti;* that is, with a provision or protection that no man shall *impetere,* or sue him for waste, committed. But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action of waste lie for the debtor against tenant by statute, recognizance, or *elegit;* because against them the debtor may set off the damages in account; but it seems reasonable that it should lie for the reversioner, expectant on the determination of the debtor's own estate, or of those estates derived from the debtor.'

"The proprietor of a qualified or base fee has the same rights and privileges over his estate, till the contingency upon which it is limited occurs, as if he were tenant in fee simple. Walsingham's case, Plowd., 557,—Chitty.

"In Weed v. Woods, 71 N.H. 581, it was held that where a deed reserves to a grantor a certain portion of the premises so long as a religious association may want it, the estate retained is a qualified or determinable fee; and during its continuance the grantor and his successors in title, while they retain possession, have all the rights of tenants in fee simple.

"Mr. Washburn, in his treatise on real property, 4th edition, volume 1, page 89, section 86, in speaking of the incidents of a determinable fee says:

'So long as the estate in fee remains the owner in possession has all the rights in respect to it which he would have if tenant in fee simple, unless it be so limited that there is properly a reversionary right in another—something more than a possibility or reverter belonging to a third person, when, perhaps, chancery might interpose to prevent waste of the premises.'

"In Gannon v. Peterson, 55 L.R.A. 701, 193 Ill. 372, it was held that the opening of mines, and the mining of coal by the owner of a determinable fee in property of which the coal constituted the chief value, was not such waste as could be enjoined by the owners of the expectancy, who claimed under an executory devise—at least where it is not made to appear that the contingency which would determine the fee was reasonably certain to happen. In discussing the question the court said:

'The authorities are uniform as to the definition, duration, and extent of a base or determinable fee. They are agreed that it is a fee-simple estate; not absolute, but qualified. Upon the death of the donee, his widow has dower, although the contingency may have happened that defeats the estate, and that within the general acceptation and meaning of the term the person seized of such an estate is not chargeable with waste.'

"The only exception to this rule is that equity will sometimes restrain equitable waste. Equitable waste is defined by Mr. Justice Story to consist of 'such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them.' 2 Story Eq. Jur., sec. 915. The same author further says: 'In all such cases the party is deemed guilty of a wanton and unconscientious abuse of his rights, ruinous to the interests of other parties.' Lord Chancellor Campbell, in Turner v. Wright, 6 Jur. N. S., 809, 29 L. J. Ch. N. S., 598, defines equitable waste to be 'that which a prudent man would not do with his own property.'

"Even if an action for damages would lie for equitable waste, a question not decided, there is nothing in the record before us to show that Bryant Landers was guilty of such waste.

> It does not appear that he was guilty of a wanton and unconscientious abuse of his rights, or that he did that which a prudent man would not do with his own property. We therefore conclude that the action for waste was properly dismissed."

In the case of *Howe v. Lowell*, 171 Mass., pp. 582-3, the court said:

> "As the grantee took the lands in fee, it is entitled to make any use of the land not in violation of the conditions in the deeds, *whether the parties thought of it or not.*"

Congress, when it attached to the otherwise unqualified estate of the grantee the covenant found in the settlers' clause, and when it made the grant itself, did think of some things—of some limitations or of some limitation upon the estate, but that limitation did not include the timber upon the lands granted. There was something in the lands granted —a product or component of the soil—which Congress did think of and which Congress expressly and pointedly excepted out of the estate, and that was the mineral therein.

The original act of July 25, 1866, in Section 10 thereof, reads as follows:

> "And be it further enacted, That all *mineral lands* shall be excepted from the operation of this act; but where the *same* shall contain *tim-*

> *ber,* so much of the *timber* thereon as shall be required to construct said road *over such mineral land* is hereby granted to said companies: Provided, that the term 'mineral lands' *shall not include lands containing coal and iron.*"

The act of May 4, 1870, Section 7, grants

> "each alternate section of the public lands, *not mineral,* excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof."

It is thus seen that Congress expressly dealt with the mineral contents of the lands granted by the act of 1866, and indeed, in an express but partial way, with the timber thereon; but the Congressional exception conspicuously includes in its limitation of the grant only such timber as there shall be, not on the granted lands, but on the excluded mineral lands, and even as to such excepted timber the company is accorded the right to use so much as shall be necessary "to construct said road over such mineral land." And in the act of 1870, the minerals, in distinction from the timber, are expressly excluded from the operation of the grant. And more than that, even in the exception of the minerals, it is provided that such exception shall not include coal and iron—a plain recognition of the grantee's right to the coal and to the iron existing

in the granted lands; and yet, in the decree as signed by the District Court, it seems not to have been enough to exclude our right to the timber standing upon the non-mineral unexcepted and granted sections, but all mineral deposits, including, therefore, the coal and iron, are excluded by the terms of the decree.

It is not of moment, as said in the Massachusetts case of *Howe v. Lowell, supra,* whether Congress thought of the timber or not. But Congress did think of the timber, and it thought of the minerals, and it dealt with the timber and with the minerals in a way to make it convincingly evident that so far as the lands actually granted were concerned, no limitation upon the estate of the grantee in respect to the timber, or in respect to the coal or iron, was contemplated or imposed. The case is a revealing instance of that canon of construction—the rule of *expressio unius*—which the Supreme Court invoked and applied in passing upon the question of a condition subsequent. For it will be remembered that the opinion of the court contrasts the expressed penalties of reverter and forfeiture attached by Congress to failure on the part of the grantee to construct the railroad within the prescribed time, or to file its assent within the prescribed time, with the absence of such penalties or of any penalty from the provisos in which the settlers' clause is contained.

It appeared from the record which the Supreme Court had before it (Vol. 13, pp. 6836-7) that the company had been under an expense, in administering the grant from April 1, 1870 to April 30, 1911, of $1,184,542.84; and that it had paid taxes on the granted lands to 1910 inclusive, and that there had been levied on said lands taxes for the year 1911, and that during the more recent years of the above period taxes had been levied upon an assessed valuation in excess of $2.50 per acre—ranging from $2.96 per acre up to $10.32 per acre—the taxes so paid and levied amounting to $2,434,843.33 (Vol. 5, pp. 2567-); making a total administration expense, including taxes, of $3,619,386.17. The total cash receipts from all sources, April 1, 1870 to April 30, 1911, including sales of land (Vol. 13, pp. 6836-7) are stated to be $5,488,020.72. This leaves the company a net revenue from past transactions up to April 30, 1911, over and above expenses paid and taxes levied, of $1,868,634.55. The average net revenue per acre for the lands sold, aggregating some 820,000 acres (Vol. 4, p. 1578) figured up to April 30, 1911, on the basis of the above items, was $2.27.

The grant required the company to carry free for the United States government its property and troops, without limit as to time. The value of this free transportation, at the regular rates and computed for

the service over the company's line in Oregon between 1882 and 1911 inclusive, is $1,894,970.09 (Vol. 13, pp. 6835-6, and computation based thereon). This amount is in excess of the receipts of the company, hereinabove mentioned by $26,335.54. And if these figures could be carried down to date, the deficit would be considerably increased, and further, the average net revenue, above indicated, of $2.27 per acre for the land sold, would be expressed by a diminished amount.

COSTS WERE IMPROPERLY TAXED AGAINST THESE APPELLANTS.

The great question in the case, and upon which the decision of the District Court in the first instance, and afterwards of the Supreme Court, turned, was the question of forfeiture—whether the settlers' clause was a condition subsequent or a covenant. Upon that question these appellants prevailed. It may be suggested that we put testimony into the record, going to the question of estoppel and waiver, as against the right of the government to urge a violation on our part of the covenants, and it is true that the case did not go off upon the question of waiver or estoppel. But this same testimony, so put by us into the record, had its bearing upon the point on which the case was made to turn—that is to say, the question whether the settlers' clause was a con-

dition subsequent, for it went to the question of practical and contemporaneous exposition of the statute—and more particularly of its exposition at the hands of the Executive Department, charged with the administration of the law. It went to show by such exposition that the settlers' clause had been expounded and construed, in practice, as a covenant. This was recognized in the opinion of the Supreme Court, 238 U. S., at pages 424-5, where it is said:

> "It is contended that if sales were made under the limitations of the provisos the breaches were acquiesced in, and for this the action and knowledge of the officers of the government are adduced—indeed the knowledge of Congress itself; and reciting what was done under the grants, counsel say: 'It is a story of mortgages and sales, executory contracts and conveyances, and a stream of government patents flowing in between. These things were known of all; they were matters of common knowledge, notoriety, of public record; the railroad knew them; the people knew them, the government knew them.' And cases are cited which, it is contended, establish that such circumstances might work an estoppel even against the government, which, when it appears in court, it is contended, is bound like other suitors, and certainly establish that for more than forty years in the view of the executive officers *the provisos were not conditions subsequent. Granting their strength in that regard,* granting they have some

> strength in every regard, they have not controlling force, considering the provisos *as simple covenants*. And they cannot be asserted as an estoppel."

And if it be suggested, as it was suggested by the District Judge, that the United States "was required to bring this suit in order to determine as to the violations of this proviso, and the government has prevailed in the end and the court has declared that the railroad company has violated the provisos —I think for that reason the government should recover costs," the answer is not difficult. The government, in the first place never brought suit to determine as to the violations of the proviso on its own initiative. It was memorialized to do so, as we pointed out, by the Legislature of Oregon: and that memorial did not come into being until the year 1908, some forty years after the passage of the granting act, and more than thirty years after the administration of this grant, as it was administered by the railroad company and had become a "matter of common knowledge, of notoriety, of public record." The transactions of the railroad company in respect to the sales of these lands, as we have already noticed, were communicated in a detailed and itemized way to the bureau of the Interior Department, specially constituted to have such matters in charge, the transactions were communicated by the

bureau to the Secretary of the Interior, by him to the President and by the President to Congress. It is, we submit with deference, not equitable upon the grounds suggested and in view of the long and known history of the transactions, to tax costs against the railroad company, after it has prevailed in the substantive contention, upon a suggestion that the government was required, by the fault of the railroad company, to bring this suit "to determine as to the violations of this proviso." The very temporary injunction, which the government now seeks to import by this decree into the general injunction against future violations of the covenants, itself rested upon the very testimony which we put into this record as to the non-settlement character of the lands. The Supreme Court in its opinion, as we have quoted it, sums up that testimony and makes it the basis and explanation of the reference of the subject matter to Congress. It is, we think, a most unusual assessment of costs, under the circumstances of this case, to penalize these appellants, as this decree does (Tr. p. 96), with costs taxed at $6,249.02.

In the case of *Northern Trust Company vs. Snyder,* 77 Fed. 818, the court said:

> "Without undertaking to go further than the case before us requires, we are of the opinion that the appellant is entitled to the costs of this appeal. The appellant has succeeded in reversing the decree in the most important part, so

> far as the amount of money is concerned. It is true the appeal was from the entire decree, and that the appellant contested the right of the appellee to the recovery of any amount. We think, however, it would be a harsh rule that would deprive an appellant of the statutory costs of appeal unless success attended the whole contention. Where the appeal has substantially prevailed we perceive no reason to deny to appellant the statutory costs which have been incurred in the successful attempt to assert a right."

While this language was used of costs on an appeal, it expresses the spirit and principle by which a court should be moved, a court of equity especially, in determining the assessment of costs.

In Street on Federal Equity Practice (Section 2022) it is said:

> "Situations frequently arise where it is deemed inequitable for all the costs to be imposed on either party exclusively, and where this appears to be the case, the case may be disposed of without adjudging costs in favor of either, but leaving each to bear the costs of his own side of the litigation."

Of course, we are not authorized to ask for costs against the United States; but it must excite some special wonder that an application should have been made here by the government for costs, in view of the principal question at issue and the final adjudication of that question in the Supreme Court of the United States. It should excite some surprise that the government, defeated in its principal contention, should come to the court of first instance and ask that these appellants be penalized in costs because they substantially prevailed on the turning point of the case.

It is now respectfully submitted that the decree of the District Court, herein appealed from, is not in accordance with the opinion of the Supreme Court, and that it should be reversed, with directions to enter a decree, pursuant to the mandate of the Supreme Court of the United States, and without costs to these appellants; and such a decree, it is respectfully submitted, is the decree which the appellants proposed to the District Court and which is set forth in the transcript of this record.

Respectfully submitted,

WM. F. HERRIN,

P. F. DUNNE,

WM. D. FENTON,

Solicitors for Defendants and Appellants, Oregon and California Railroad Company, Southern Pacific Company, and Stephen T. Gage, Individually and as Trustee.

FRANK C. CLEARY,

of Counsel.